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Willard D. Lorensen

West Virginia University College of Law

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The Uniform Commercial Code Sales Article Compared With West Virginia Law

(Conclusion)*

WILLARD D. LORENSEN**

Section 2-601. Buyer's Rights on Improper Delivery.

Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Section 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

(a) reject the whole; or
(b) accept the whole; or
(c) accept any commercial unit or units and reject the rest.

In the main, this provision makes no significant change in existing West Virginia law, though subsection (c) would help to clarify the knotty problem of partial acceptance.

Two West Virginia cases which involved determinations of the effect of a partial acceptance have reached conclusions in accord with the commercial unit concept of subsection (c), but the most recent decision on the point tends to run counter to this idea. In Norman Lumber Co. v. Keystone Mfg. Co.,260 decided in 1925, the buyer was not prejudiced in his rejection of four car loads of lumber by his acceptance of other conforming carloads ordered under the same contract. And in Regent Waist Co. v. O. J. Morrison Dep't Store Co.,261 the buyer's acceptance of part of an order of clothing goods did not temper its right to reject a non-conforming part where the price was readily apportionable. However, in Dixie Appliance Co. v. Bourne262 the buyer was held to have accepted all of an order

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*This is the concluding article of a series of three on the Uniform Commercial Code Sales Article. Previous portions appeared in the December and February issues of the West Virginia Law Review.

**Associate Professor of Law, West Virginia University.

260 100 W. Va. 515, 131 S.E. 12 (1925).

261 88 W. Va. 303, 106 S.E. 712 (1921).


[260]
of fourteen reels of cable by the acceptance of seven of the reels. The Code provision here would not bar a rejection of a part of the order simply because another part had been accepted, as it appears that a single reel of cable could be treated as a commercial unit. "Commercial unit" is defined in section 2-105 of the Code and relies principally upon commercial usage.263 What constitutes a commercial unit could, in close cases, be a question of fact.

The comments to the present section state that a buyer does not forfeit any remedy otherwise available to him by acceptance of a non-conforming tender.264 This rule would be most difficult to draw from the language of this section alone, and fortunately it is not necessary to do so. Section 2-607 states plainly that acceptance of a non-conforming tender eliminates only the buyer's right to reject that tender, thus the buyer's right to damages survives.265

Section 2-602. Manner and Effect of Rightful Rejection.

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two following sections on rejected goods (Sections 2-603 and 2-604),

(a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security

263 Subsection (6) of U.C.C. § 2-105 provides as follows: "'Commercial unit' means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole."

264 U.C.C. § 2-601, Comment 1.

265 Note that under § 2-206 a shipment of non-conforming goods constitutes an acceptance to an offer unless the seller "seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer." This provision precludes the possibility of the claim that the buyer's acceptance of a non-conforming shipment is an acceptance of a counter-offer where the seller did not communicate any acceptance to the buyer's original offer independent of the shipment of the non-conforming goods.
interest under the provisions of this Article (subsection (3) of Section 2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) the buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this Article on Seller's remedies in general (Section 2-703).

This provision ties together and lays the foundation for a series of sections dealing with rejection and "revocation of acceptance." There is nothing particularly new or different involved in this provision as relates to present West Virginia law save the qualifying phrases referring to other sections which would involve new sales law rules in this state.267

Subsection (2) (c) makes it clear that a buyer has no obligations beyond those stated in the preceding subsection (viz., reasonable care) where it could be argued under West Virginia law that the buyer may have an additional obligation. In Ford v. Friedman,260 a buyer rightfully rejected a shipment of shoes and notified the seller promptly of the rejection. The seller countered with an offer of more favorable terms if the buyer would accept the shoes and the buyer did not respond to this. Under these facts, the court held that the buyer was deemed to have accepted the goods by his failure to either (a) reject the seller's last offer or (b) return the goods. In the many years that have elapsed since the Ford decision in 1895, it seems never to have been elsewhere seriously contended that the buyer is under an obligation to return rightfully rejected goods,269 and thus the Code provision which cuts off the buyer's

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267 E.g. A merchant buyer is under no duty to resell any goods rightfully rejected under present West Virginia law as compelled by § 2-603.

268 40 W. Va. 177, 20 S.E. 930 (1895).

269 In Morgan-Gardner Co. v. Beelick Knob Coal Co., 91 W. Va. 347, 112 S.E. 587 (1922), the buyer rightfully rejected goods sent and placed it under protective cover, notifying the seller that the goods were held for his disposal. This was held an effective rejection.
obligations at reasonable care as provided in subsection (2) (b) probably would effect no practical change in existing law in this state.

Section 2-603. Merchant Buyer's Duties as to Rightfully Rejected Goods.

(1) Subject to any security interest in the buyer (subsection (3) of Section 2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten per cent on the gross proceeds.

(3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

There is no duty under present West Virginia law for a merchant buyer to make reasonable efforts to sell rightfully rejected goods under the circumstances outlined in this section. Two West Virginia cases involve the problem of the seller's plight where perishable goods are sold to a buyer at a distant point. In Vaccaro Bros. & Co. v. Farris, 92 W. Va. 655, 115 S.E. 830 (1923) it was held that the trial court should have given a binding instruction in favor of the plaintiff seller. The seller's evidence showed that bananas were shipped in "grass green" condition from New Orleans and properly iced in railroad cars until accepted by the defendant buyer while the cars were enroute. The defendant buyer did not inspect the carload until about thirty-eight hours after it arrived in South Charleston, West Virginia, and failed to show whether the car had been iced after its arrival. When inspected, the bananas were too ripe for wholesale marketing. In Mullins v. Farris, 100 W. Va. 540, 131 S.E. 6 (1925) the court held that the evidence supported the jury verdict for the seller that green beans shipped from Tennessee were in merchantable condition when shipped. The following quotation indicates a rather sympathetic attitude towards the seller under these circumstances: "Defendant's instruction
tection is presently afforded many shippers of perishables under the federal Perishable Agricultural Commodities Act of 1930.\textsuperscript{271} But common law and the Sales Act still leaves some doubt as to the rejecting buyer's right to resell to avoid further loss, and neither viewed resale as a duty.\textsuperscript{272} The Code position, while affording protection to the buyer by reasonable limitations on his duty of resale, broadens the protection even further by including not only perishables but also other commodities which may decline rapidly in value.\textsuperscript{273}

Section 2-604. Buyer's Options as to Salvage of Rightfully Rejected Goods.

Subject to the provisions of the immediately preceding section on perishables if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account or reship them to him or resell them for the seller's account with reimbursement as provided in the preceding section. Such action is not acceptance or conversion.

This section conforms to West Virginia law and changes by a matter of degree the standard of care which must be used by the rejecting buyer to resell the goods of the seller who has refused to retake the goods.

No. 5, refused, would have told the jury that if, under the terms of purchase, the defendant's were given the right to inspect the beans before accepting [sic] them, and upon making such inspection their quality and quantity were not as represented, then the defendants were entitled to reject them. The instruction was properly refused. There is no evidence tending to support the theory that the defendants were given the right of inspection before accepting the goods.\textsuperscript{274}

\textsuperscript{271} 46 Stat. 531 (1930); 7 U.S.C. §§ 499 (a) — (s) (1952).
\textsuperscript{272} See generally, Baker v. J. C. Watson Co., 64 Idaho 573, 134 P.2d 613 (1943). The difficulty arises from the act of resale appearing to be an act of ownership or dominion, thus an acceptance of the non-conforming goods. Compare, Thompson v. Douglass, 35 W. Va. 337, 13 S.E. 1015 (1891) where a buyer apparently rightfully rejected a carload of flour, notifying the seller, but was held to have accepted and become liable for the price because he permitted another, to whom he thought the seller had actually intended to ship to goods, to remove the goods.
\textsuperscript{273} See Grainger Bros. Co. v. G. Amsinek & Co., 15 F.2d 329 (8th Cir. 1926). The Code comments do not elaborate upon the range of goods intended to be covered by the phrase "threaten to decline in value speedily." The range could be quite broad, e.g. seasonal clothing items, special holiday candies, fad items, popular recordings, and the like.
In *Norman Lumber Co. v. Keystone Mfg. Co.*"\(^{274}\) the buyer rightfully rejected four carloads of lumber and when the seller refused to retake the lumber, the buyer resold them for the seller's account. The standard which the buyer must meet according to the *Norman Lumber* case was described by the court as "the utmost diligence and good faith."\(^{275}\) The Code, by reference to the preceding section demands only "good faith and good faith conduct" which is a bit less demanding of a buyer who wishes to dispose of rejected goods. The authority to store\(^{276}\) or return\(^{277}\) are recognized under present West Virginia law.

### Section 2-605. Waiver of Buyer's Objections by Failure to Particularize.

(1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach

(a) where the seller could have cured it if stated seasonably; or

(b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents.

This section would clarify an existing policy of West Virginia law. In *Linger v. Wilson*,\(^{278}\) the court summarized its ruling on this

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\(^{274}\) 100 W. Va. 515, 131 S.E. 12 (1925) (alternative holding). The defendant buyer claimed seller's agent had authorized resale of rejected lumber. The court agreed that such authority had no doubt been given, but held that the buyer had such a right as a matter of law.

\(^{275}\) Id. at 536, 131 S.E. at 16.


\(^{277}\) Ford v. Friedman, 40 W. Va. 177, 20 S.E. 930 (1895).

point in the following terms: "When refusal to accept goods purchased is based solely upon a particular objection, formally and deliberately stated, all other objections are deemed waived." This places a stricter burden on the rejecting buyer than the Code provision but does not state when, if ever, the buyer is under an obligation to make known his objections to the seller's tender.

Under the Code section, the merchant buyer automatically loses his right to claim a rejection based on a curable defect by his failure to state this reason, if such defect is ascertainable by a reasonable inspection. Substantially, this was the situation posed in the Linger case, though the syllabus point was not tempered by any concern for the nature of the defect. It should be noted also in connection with subsection (1) (b) that the seller's demand for a "full and final" statement of defects is qualified by the opening language of the provision which obligates the buyer to report only those defects which may be discovered by a reasonable inspection.


(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or

279 Id. syllabus 1.
280 In Gibson v. Adams & Tucker, 98 W. Va. 671, 127 S.E. 514 (1925) the court relied on the buyer's failure to specify objections as an alternative ground for reversing, on facts, a jury verdict for the defendant buyer. The contract of sale permitted a one-day trial of a gasoline engine, at the end of which the buyer was obligated to inform the seller of flaws in the engine and buyer had the option to return if seller's mechanic could not correct these flaws. The buyer kept the engine four months before making a demand that the seller retake the engine, though intermediate objections to the performance had been made. The court held that by retaining the engine and using it for such a period, the buyer waived his right to reject, and noted the one-day limit of the contract as an added reason for its conclusion. Strict enforcement of the one-day provision could well be held an unconscionable provision. See U.C.C. § 2-302.
281 A curable defect is one that the seller could correct within the time for performance. See U.C.C. § 2-208.
282 Though the court does not specifically so state, it is inferrable that the court recognized the propriety of giving the seller an opportunity to cure his tender. In the Linger case, note 278, supra, the tender was improper because an amount of wheat in excess of that ordered was delivered.
283 See note 280, supra.
(b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller’s ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

Numerous points bear mention in connection with this section, but an accurate statement of what impact this section would have is difficult because of the confused state of West Virginia law on some points involved. Two points may be disposed of quickly. First, this provision continues the Code concept of “commercial unit” and permits acceptance or rejection to apply to commercial units within a more encompassing transaction. West Virginia law on this matter was discussed under Section 2-601. Second, subsection (1) (c) poses a new twist in acceptance by exercise of dominion not presently found in West Virginia law. While it has been recognized in this state that the exercise of dominion may constitute acceptance, no case has ever posed the question of whether a seller may refuse to acknowledge such “acceptance” when it is wrongful as to him. For example, a buyer who rightfully rejects a tender of goods by adequate notice to the seller, may subsequently find that it would be advantageous to take the non-conforming goods. Such a situation could arise, for example, where a strike suddenly caused a shortage of the kind of goods involved. Once rejected, the buyer’s exercise of dominion over the goods is wrongful as to the seller. If the value of these goods suddenly rises, the buyer disposes of the goods at an inflated price, the seller, under the Code provision could treat this as a conversion and fix his damages by the value of the goods at the time of the buyer’s wrongful exercise of dominion, rather than an acceptance which limits his recovery to the contract price.

The most significant change in present law could result from subsection (1) (b) and the general policy which it reflects. Other

Code provisions bearing upon acceptance help give a meaning to this provision which runs contrary to what is apparently the law in West Virginia, but there is no unequivocal language of change contained in the provision. The important point in the subsection is that it stresses that acceptance by failure to reject does not occur until there has been a reasonable opportunity to inspect. Superficially at least, it could be said that this view has been embraced by the law of this state. Note the following language from Kemble v. Wiltison:265

"[W]here the seller of personal property has expressly warranted it, the buyer, upon delivery of the property to him, even though the title has passed and vested in him, may rescind the contract upon discovering that the warranty has been broken, provided he acts promptly and does not so use the property as to indicate that he unequivocally accept it in satisfaction of the contract."266

The court said that the buyer had the right to rescind here even though the price had been paid, the buyer had actual possession of the goods involved for several days and had put the goods to use.

What leaves lingering doubts about the compatibility of the Code policy and existing West Virginia law are two prior cases and the court's reluctance to temper their holdings. Each of these cases involved attempts by buyers to reject after they discovered the goods to be non-conforming, but in each case the court apparently took the view that the "reasonable opportunity for inspection" had passed. Thus existing West Virginia law apparently takes a very narrow view of what is a reasonable opportunity to inspect, one that is much narrower than that which the Code contemplates.

The first of these unsettling decisions is Eagle Glass & Mfg. Co. v. Second Hand Pipe & Supply Co.267 There the seller warranted its pipe to be capable of withstanding a certain pressure and the buyer, after laying pipe in a line, claimed that the pipe failed to withstand a much lesser pressure. The buyer dug up the pipe and rejected it. The court apparently viewed the manner of testing employed as unreasonable:

"Plaintiff accepted the greater part of the pipe delivered, and used the material for the purpose for which it was purchased—

265 92 W. Va. 32, 114 S.E. 369 (1922).
266 Id. at 40, 114 S.E. at 372.
267 74 W. Va. 228, 81 S.E. 976 (1914).
the laying of a pipe line. Plaintiff converted the pipe to its own use. . . . If when delivery of the pipe was tendered, plaintiff had tested it and found that it did not conform to the warranty, plaintiff could have rejected it—could have refused to become the owner of it. . . .

The nature of the test employed here was much the same as that in the Kemble case which was decided later—a use test. In one the court said this was proper, in the other, improper. The court ventured this wholly unsatisfactory distinction of the Eagle Glass case in the Kemble opinion:

"A reading of the opinion in that case, however, clearly shows that not only had the title passed, but that the buyer had used the property in his business, and did not make any effort to rescind or return the property when he discovered the breach of the warranty, and that was the real ground upon which the decision was based. . . ."

But the statement of facts appearing in the Eagle Glass case shows that the buyer dug up the pipe as soon as it proved incapable of withstanding the pressure and returned it to the railroad siding where it had been received. The reluctance to recognize the conflict between Kemble and Eagle Glass leaves the reasonableness of a use test very much in doubt.

Another prior decision not mentioned in the Kemble case strongly supports the view of the Eagle Glass case. This is American Sugar Refining Co. v. Martin Nelly-Grocery Co. There a wholesale buyer of groceries sought to reject a shipment of sugar after it received complaints from customers that the sugar was not of the quality that the wholesaler’s contract demanded. The court said, "The fact that the sugar was in bags does not preclude inspection or relieve from the duty to inspect." This view is highly impractical today where packaging is such an important aspect of merchandising goods. The buyer apparently must either break the

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285 Id. at 230, 81 S.E. at 977.
289 92 W. Va. at 40, 114 S.E. at 372.
290 74 W. Va. at 229, 81 S.E. at 976: "Thereupon plaintiff took up the line and returned the pipe to defendant at the railroad station from which plaintiff had received it. . . ."
291 90 W. Va. 730, 111 S.E. 759 (1922).
292 Id. at 734, 111 S.E. at 369.
package and make a thorough inspection or run the risk of being saddled with non-conforming goods. 293

Three points indicate that the Code would relax the Eagle Glass and American Sugar decisions. First, subsection (1) (b) of the present section stresses that failure to reject becomes acceptance only after there has been a reasonable opportunity for inspection. Second, the provision relating to rejection requires that it must occur within a "reasonable time" after the delivery—it does not require rejection to be immediate or prompt. 294 Third, the Code permits acceptance to be revoked under certain circumstances in section 2-608—further recognition of the fact that the buyer's reasonable opportunity for discovery of non-conformity may not occur until some time after the actual delivery of the goods. Revocation of acceptance, of course, does not become an issue until there has been an acceptance. And acceptance by a failure to reject does not occur, under the Code view until there has been a reasonable opportunity to inspect.

Section 2-607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over.

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) and the buyer is sued as

293 Note that West Virginia has adopted the "sealed container" exception to the usual rule of implied warranty of merchantability which recognizes the fact that a merchant purchasing goods in sealed containers has no way of determining the quality of the goods in those containers. See, Pennington v. Cranberry Fuel Co., 117 W. Va. 680, 186 S.E. 610 (1936).

294 See U.C.C. § 2-602.
a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expenses and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

(6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of Section 2-312).

This provision covers a wide range of points, many of which are unresolved under existing West Virginia case law. At those points where present law does give some direction, it is consistent with that of the present section.

Subsection (1) requiring that the buyer pay the contract rate for goods accepted states a rule that is assumed by numerous West Virginia decisions. Subsection (2) makes it clear that acceptance bars only the right of rejection, but leaves other remedies unaffected. In *Schaffner v. National Supply Co.*,295 the seller maintained that

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295 80 W. Va. 111, 92 S.E. 580 (1917).
the buyer's right to damages for the failure of the goods to conform to the contract was barred by the buyer's acceptance of the goods. This view was rejected and the court permitted recovery of damages where the buyer accepted the goods unaware of the non-conformity. And in *Hayssen Mfg. Co. v. Mootz* the buyer was permitted to recover damages even though the wrapping machine involved in the sale failed to operate properly from the outset. The fact that the seller continued to attempt to put the machine in proper condition with the cooperation of the buyer excused the buyer from rejecting the machine for known deficiencies or waiving his right to damages. Thus, the principles stated in subsection (2) are presently recognized in this state.

Before the coming of the Uniform Sales Act, a division of authority developed in this country as to whether implied warranties survived acceptance of the goods by the buyer. The case of *Morse v. Moore* became the leading authority for the moderate view that such warranties did survive acceptance, but the case emphasized the obligation of the buyer to give reasonably prompt notice to the seller of the breach. This latter view was adopted in the Uniform Sales Act and much litigation has developed around the reasonableness of notices given. West Virginia adopted the *Morse v. Moore* rule in *Schaffner v. National Supply Co.* but the question of reasonableness of notice has never become a significant issue in any case in this state. The Code section provides in subsection (3) (a) that such notice must be given. This conforms to a more or less implicit requirement of existing law in this state.

The concern of subsection (3) (b) and subsection (5) with the rights and obligations as between buyer and seller where the buyer is subjected to litigation by a third party is presently not covered by West Virginia law.

Subsection (4) states the standard rule that establishing a breach as to accepted goods is the burden of the buyer.

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296 116 W. Va. 204, 179 S.E. 301 (1935).
298 83 Me. 473, 22 Atl. 362 (1891).
299 Uniform Sales Act § 49.
301 80 W. Va. 111, 92 S.E. 580 (1917). The Schaffner case dealt with a breach of a warranty of description which is presently characterized as an implied warranty.
302 See, e.g. Grand Rapids Show Case Co. v. Earle Rogers Co., 103 W. Va. 64, 736 S.E. 602 (1927).
Section 2-608. Revocation of Acceptance in Whole or in Part.

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty or discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

Revocation of acceptance is a new concept introduced by the Code. It would be new to West Virginia and would liberalize the remedies available to a buyer who has received non-conforming goods. It would also help to avoid a continued source of confusion which arises from the treatment of a rejection of goods under some circumstances as a "recission" of some sort.

Under present law, once goods are accepted, the buyer cannot "rescind" but must rely solely upon his remedy for breach.303 As noted under the discussion of section 2-606, Kemble v. Wiltison304 opened the door a bit for the buyer under such circumstances, permitting the buyer there to "rescind" though he had taken physical possession of the goods involved and exercised dominion over them. Return of the goods was permissible there, the court said, because

304 92 W. Va. 32, 114 S.E. 369 (1922).
the only use made of the goods was a testing of them.\footnote{In describing the buyer’s right to rescind in the Kemble case, \textit{supra} note 304, the court concluded with the following phrase, \textit{id.} at 40, 114 S.E. at 273: “[P]rovided he [the buyer] act promptly and does not so use the property as to indicate that he has unequivocally accepted it in satisfaction of the contract. . . .”} In the context of prior cases, the use of goods not \textit{solely} consonant with a test is usually considered an exercise of dominion which amounts to acceptance and thus bars any subsequent attempt to return the goods.\footnote{In \textit{American Sugar Refining Co. v. Martin-Nelly Grocery Co.}, 90 W. Va. 730, 111 S.E. 759, (1922) the wholesaler buyer of the sugar involved apparently did not learn of the non-conforming of the sugar delivered until he received complaints from customers who had opened the sacks containing the sugar. Even after this time the buyer made a payment, claiming this was done under the assumption the seller would make a proper adjustment. Note the parallel of the buyer’s position here and subsection (1) (a) of the present section.} Thus, if a retail grocer gets a bad batch of canned goods and he can discover this only upon the complaints of his customers who have opened various cans purchased, the grocer is precluded from returning the remaining goods and “rescinding” under present law. The Code provision here would, contrariwise, permit him to revoke his acceptance. It would not saddle him with a money recovery that may be inadequate and with the troublesome chore of disposing of non-conforming goods.\footnote{In \textit{Eagle Glass & Mfg. Co. v. Second Hand Pipe & Supply Co.}, 74 W. Va. 228, 81 S.E. 976 (1914) the court noted that used pipe attempted to be returned by the buyer had some value which should be off-set against the buyer’s recovery for non-conformity of the goods. Disposing of such material without undue loss can be a serious problem where the business firm or individual involved is not in contact with the market for such goods. Storage and proper preservation of goods could be a troublesome problem to the buyer left with non-conforming goods.}

In the discussion of this section and of section 2-606 the word \textit{recession} has been tucked between quotation marks because its use in connection with the rejection of goods under a sales transaction is misleading. The confusion which is invited by the use of that term in this context may be shown by a few lines from the opinion in \textit{American Sugar Refining Co.} case,\footnote{\textit{id.}, at 734, 111 S.E. at 761.} where the buyer attempted to reject, belatedly, a shipment of non-conforming sugar:

“\textit{It is well settled in this state that where the contract is executed, and warranty is relied upon, recession cannot be had. . . . The plea being one setting up recession, cannot be good as a pleas for breach of warranty. If there was a recession, then there was no contract in existence. . . .}” (Emphasis added.)\footnote{\textit{id.}, at 734, 111 S.E. at 761.}
The buyer who wants to reject non-conforming goods, be it at the time they are first tendered, or be it at a later time when a latent and substantial defect first comes to his notice, is deprived of a part of the benefit of his bargain. The Code provision would afford him the opportunity of returning the non-conforming goods, wiping out his obligation to pay the price and retain for him any other remedy the law affords to one who has suffered by another's failure to perform a promised obligation.

Section 2-609. Right to Adequate Assurance of Performance.

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

This section would introduce a new principle into West Virginia law. It is based on the idea that the business man bargains for more than "a promise plus a right to win a law suit."  

West Virginia presently recognizes the right of a seller to suspend performance in two narrow situations—in the case of the

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310 U.C.C. § 2-609.
seller's lien\footnote{Rine & Lynch v. Ireland Lumber Co., 86 W. Va. 114, 103 S.E. 452 (1920).} and the seller's right to stop goods in transit.\footnote{Sharp v. Campbell, 189 W. Va. 526, 109 S.E. 611 (1921).} Both these rights of the seller reflect a concern for the seller's reasonable expectancy that he is going to be paid for the goods sold. Note in these situations that the title to the goods has passed to the buyer, but the seller is permitted to continue to exercise control over them to assure himself some security for receiving the purchase price. The Code provision here expands this same concern to all phases of the sales transaction and doesn't limit it only to the seller who becomes concerned with his buyer's solvency. The buyer may become equally concerned about the seller's ability to furnish conforming goods. For example, if a building contractor has agreed to purchase all his lumber supplies from a certain seller and he learns that the seller of late has frequently been making non-conforming deliveries to other contractors, the builder may demand adequate assurance from his seller that conforming deliveries will be made to protect himself from delays in his work schedules.

The broad thrust of this provision would be new. It is essentially a generalization of a right now narrowly recognized in the instance of the seller who has reasonable grounds to fear his buyer's ability to pay the purchase price.

Section 2-610. Anticipatory Repudiation.

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

(a) for a commercially reasonable time await performance by the repudiating party; or

(b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the
seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704.)

West Virginia has recognized the doctrine of anticipatory breach or repudiation of a contract, but present case law in this state does not spell out the variety of remedies available to the aggrieved party as does this Code provision.

The remedies available to the aggrieved party are broadened, but discussion of this point is taken up under the sections specifically bearing on remedies.

Section 2-611. Retraction of Anticipatory Repudiation.

(1) Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.

(2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this Article (Section 2-609).

(3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

West Virginia has recognized the right of the repudiating party to retract his repudiation, but the cases seem to indicate that the aggrieved party is more limited in his powers to cut off this right than the Code provision allows.


314 The principle cases cited in note 313, supra, both involved the question of whether suit could be brought before time for performance had elapsed.

Repudiation comes too late, under the Code view, if it occurs after (1) time for performance has passed; (2) the aggrieved party has changed his position; (3) the aggrieved party has cancelled;\(^{316}\) or (4) the aggrieved party has otherwise indicated that he considers the repudiation as final. No doubt West Virginia would be in accord on points (1) and (2), but it is questionable that present law is in accord with the latter two ways in which the right to repudiate is terminated. This is an open question in this state, and the Code provision would establish a rule very liberal to the aggrieved party. In Swiger v. Hayman,\(^{317}\) the court made this note of the effect of the retraction:

"The [aggrieved] . . . parties took no step whatever in consequence of his renunciation. Their situation was not changed or altered in the least, and they did not signify by word or act what their wishes or purposes were, what interpretation they put upon the language and conduct of [the repudiating party] . . . nor what they intended to do, until after he had retracted, and then it was too late. . . ."\(^{318}\)

However, in Bannister v. Victoria Coal & Coke Co.,\(^{319}\) the court attributed\(^{320}\) the following statement to Judge Poffenbarger in the Swiger case and relied upon it heavily: "To work a release a refusal to perform must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise is made."\(^{321}\) If the repudiation must be both treated and acted upon as a repudiation, then the Code indeed liberalizes the aggrieved party's rights.

Section 2-612. "Installment Contract"; Breach.

(1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even

\(^{316}\) "Cancellation" is defined in § 2-106 of the Code as that which "puts an end to the contract for breach by the other. . . ." The definition is ventured there to distinguish "termination" which is putting an end to a contract for some reason other than breach by the other party. The definition has no significant bearing on what acts are necessary to "cancel" and presumably mere notification would be sufficient.

\(^{317}\) 56 W. Va. 123, 48 S.E. 839 (1904).

\(^{318}\) Id. at 127, 48 S.E. 841.

\(^{319}\) 63 W. Va. 502, 61 S.E. 338 (1908).

\(^{320}\) Judge Poffenbarger was quoting from a Supreme Court report which was in turn quoting from Benjamin's treatise on sales.

\(^{321}\) 63 W. Va. at 510, 61 S.E. at 341 (1908).
though the contract contains a clause "each delivery is a separate contract" or its equivalent.

(2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments or demands performance as to future installments.

Present West Virginia law is in general accord with this section, but the provision would add certainty beyond the known limits of present case law.

The general policy of the Code on installment contracts is fairly well expressed in the first sentence of subsection (3)—a failure to perform in conformity with the contract as to one installment must substantially impair the value of the whole before there is a breach of the whole contract.\footnote{279 Accord, J. W. Ellison, Son & Co. v. Flat Top Grocery Co., 69 W. Va. 380, 71 S.E. 391 (1911).}

The definition of an installment contract in subsection (1) is rather broad. The term is not explicitly defined presently in West Virginia law. It should be noted that contract clauses which attempt to remove an installment transaction from the usual rules of breach applicable to such transactions are made ineffective by subsection (1). Thus, the comments to the section state:

"Even where a clause speaks of 'a separate contract for all purposes', a commercial reading of the language under the section on good faith and commercial standards requires that the singleness of the document and the negotiation, to-
gather with the sense of the situation, prevail over any un-
commercial and legalistic interpretation."

Subsections (2) and (3) state with some added precision and
details rules presently applicable to individual non-conforming in-
stallments and breach of the whole contract.

Section 2-613. Casualty to Identified Goods.

Where the contract requires for its performance goods identified
when the contract is made, and the goods suffer casualty without fault
of either party before the risk of loss passes to the buyer, or in
a proper case under a "no arrival, no sale" term (Section 2-324) then

(a) if the loss is total the contract is avoided; and

(b) if the loss is partial or the goods have so deteriorated
as no longer to conform to the contract the buyer may
treat the contract as avoided or accept the goods with
due allowance from the contract price for the deterioration
or the deficiency in quantity but without further
right against the seller.

No direct West Virginia authority is found on this point. Where destruction of goods without fault is involved, the case usually arising is a suit by the seller for the purchase price under the theory that the title and risk of loss passed to the buyer upon the making of the contract.

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323 U.C.C. § 2-612, Comment 3.
324 McMullar Coal Co. v. Champion Coated Paper Co., 103 W. Va. 637,
138 S.E. 755 (1927). (Court held continued acceptance and use of non-
conforming installments barred buyer from declaring breach on another non-
conforming shipment—generally supporting the view that past practice of
buyer showed non-conformity of degree involved did not substantially impair
the value of the entire contract.) See generally: J. W. Ellison, Son & Co.
v. Flat Top Grocery Co., note 322, supra (money allowance made for prior
non-conforming installments, buyer could not refuse money allowance on
present installment and treat it as breach of the whole contract); Raleigh
Lumber Co. v. William A. Wilson & Son, 69 W. Va. 598, 72 S.E. 651 (1911).
(Seller's refusal to cure first non-conforming shipment justified cancellation
of whole contract.)
325 The general contract law principle that frustration of the object of
a contract without fault avoids the contract has been recognized in this state,
Ravenswood, S. & G. Ry. v. Town of Ravenswood, 41 W. Va. 732, 24 S.E.
597 (1896). The Uniform Sales Act adopted this general principle in §§
7 and 8.
Section 2-614. Substituted Performance.

(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

No West Virginia authority is found on the points covered by this provision.

Section 2-615. Excuse by Failure of Presupposed Conditions.

Except so far as a seller may have assumed a greater obligation and subject to the preceding section or substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance is agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Failure of presupposed conditions would probably be more easily recognized for what it is if the word "impossibility" were slipped into the provision somewhere. The word is not used but the present section is an outgrowth of the developing doctrine of excuse from performance by "impossibility." The modern trend in contract law is to treat of this problem in terms of "impracticability" and not "impossibility" and so goes the Code provision. What's more, the comments to the Code provision emphasize that it is "commercial impracticability" that is significant. The West Virginia law in this area has been thoroughly reviewed with the conclusion that actual case results in this state reflect fairly well the rather liberal view of the Restatement of Contracts, though language in certain court opinions indicates a stricter application of the "impossibility" doctrine obtains. The Code provision is probably in accord with the actual results of decided West Virginia cases.

The provisions for allocation, notice, and the like, which round out the Code provision have no counterpart under existing authority in this state.

Section 2-616. Procedure on Notice Claiming Excuse.

(1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this Article relating to breach of installment contracts (Section 2-612), then also as to the whole,

327 Restatement, Contracts § 454 (1932).
326 U.C.C. § 2-615, Comment 3.
330 E.g. "It is a well settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law or the other party. Unforeseen difficulties, however great, will not excuse him..." McCormick v. Jordon, 65 W. Va. 86, 90, 63 S.E. 778, 779 (1909).
(a) terminate and thereby discharge any unexecuted portion of the contract; or

(b) modify the contract by agreeing to take his available quota in substitution.

(2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract lapses with respect to any deliveries affected.

(3) The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section.

This provision has no counterpart in present West Virginia law. It would establish standards to be followed where excuse is claimed under the preceding section. Notice that the cut off or wiping out of the contract here is termed a "termination" and not a "cancellation." The distinction between these terms is pointed out in section 2-106.

Section 2-701. Remedies for Breach of Collateral Contracts Not Impaired.

Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this Article.

Part seven of the sales article deals with remedies generally. This section limits the application of this part of the sales article and has no counterpart of course in existing West Virginia law.

Section 2-702. Seller's Remedies on Discovery of Buyer's Insolvency.

(1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this Article (Section 2-705).

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand
made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this Article (Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them.

The right of the seller to refuse to part with his goods until he is assured of payment as provided in this section is similar to but broader than the general seller's lien as presently recognized in West Virginia.331 Here, where the buyer is insolvent, the seller may not only refuse to deliver save for cash payment on the current shipment, but may also refuse to deliver until he is paid for goods "theretofore delivered under the contract."

The right of the seller to reclaim goods by making a demand for them within ten days after their receipt by the buyer, when the buyer received them while insolvent, is new. Present law does not permit a seller to reclaim property merely because the buyer receives it when he is insolvent. The seller's right to retain rather than regain possession of goods sold is provided by the seller's lien and the right to stop in transit. But such security is lost by the buyer's taking possession of such goods.332 The theory of the Code provision is that the receipt by the buyer when he is insolvent is a "tacit business misrepresentation."333 The short time period during which the seller must act prevents wholesale reclamation upon the insolvency of a buyer.

Section 2-703. Seller's Remedies in General.

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or

332 Ibid.
333 U.C.C. § 2-702, Comment 2.
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repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612), then also with respect to the whole undelivered balance the aggrieved seller may

(a) withhold delivery of such goods;

(b) stop delivery by any bailee as hereafter provided (Section 2-705);

(c) proceed under the next section respecting goods still unidentified to the contract;

(d) resell and recover damages as hereafter provided (Section 2-706);

(e) recover damages for non-acceptance (Section 2-708) or in a proper case the price (Section 2-709);

(f) cancel.

West Virginia has no comparable statutory index of seller's remedies. The general theory of the section is that a seller is not bound to elect one remedy only but may, as the facts justify, employ a combination of remedies.

Section 2-704. Seller's Right to Identify Goods to the Contract Notwithstanding Breach or to Salvage Unfinished Goods.

(1) An aggrieved seller under the preceding section may

(a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;

(b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

(2) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease
manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

This section is intended generally to liberalize the remedies available to a seller where there is a repudiation of a contract of sale which remains completely or partly unperformed. Subsection (1) (a) seems to change existing law in this state though the precise point covered by the section has not been raised. Resale of goods "tendered" or "appropriated" has been permitted to fix the measure of damages arising from the buyer's breach, but it is doubtful under existing law whether goods can be identified or segregated after a repudiation by the buyer to lay the foundation for the seller's resale.

Subsection (2) is concerned generally with the situation of a repudiation while goods are in the process of manufacture and permits the seller substantial freedom in proceeding with the work or scrapping it. While no West Virginia authority is found dealing specifically with this point, general reflections on the doctrine of mitigation seem substantially in accord with that of the Code provision. The principal thrust of the Code position is that the seller should be permitted to act in good faith by reasonable commercial standards.

Section 2-705. Seller's Stoppage of Delivery in Transit or Otherwise.

(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent

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334 In Bennett & Hester v. Dayton, 102 W. Va. 197, 135 S.E. 13 (1926) the seller loaded and shipped seven carloads of crushed stone after buyer repudiated the contract of sale. The court held the seller could not base its damages on the difference between the net return on the stone sold from the point of destination and the contract price. The court emphasized the futility of the added transportation costs, which of course is a significant element the sale of a commodity such as crushed stone. What the court would have held had the goods been loaded and resold direct from seller's plant is open to speculation. In Fayette-Kanawha Coal Co. v. Lake & Export Coal Corp., 91 W. Va. 132, 112 S.E. 222 (1922) the buyer repudiated and the seller was allowed to base his recovery in part on the resale of coal "already mined and on hand."


336 See generally, 5 MICHE, JURIS., DAMAGES §§ 16, 17.
(Section 2-702) and may stop delivery of carload, truckload, plane-load or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(2) As against such buyer the seller may stop delivery until

(a) receipt of the goods by the buyer; or

(b) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or

(c) such acknowledgment to the buyer by a carrier by re-shipment or as warehouseman; or

(d) negotiation to the buyer of any negotiable document of title covering the goods.

(3) (a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

(c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of the document.

(d) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

West Virginia has recognized the right to stop in transit, but the Code provision would broaden the seller's rights in this regard. The right is expanded so far as stoppage when goods are held by a bailee, and also where stoppage is permitted for reasons other than insolvency.

338 There is some doubt under present law that goods in the hands of a warehouseman or other bailee can be "stopped in transit." See, 3 WILLISTON, SALES § 524 (rev. ed. 1948); VOLD, SALES § 45 (2d ed. 1959).
Section 2-706. Seller's Resale Including Contract for Resale.

(1) Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale

(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(d) the seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the
seller fails to comply with one or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Section 2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of Section 2-711).

West Virginia law has recognized the seller's right of resale generally,339 and to the degree that any detail has been added to this general proposition, it is compatible with the Code provision.340 Notice however that the right of resale is expanded to include goods identified to the contract after the buyer's repudiation consistent with section 2-704. In this respect, the Code provision grants an additional remedy to the aggrieved seller.

The principal aim of the Code provision is to permit the seller to act in a commercially reasonable way and avoid too rigid or technical rules for the resale.341 Thus, private or public sale is authorized, so long as the method employed is commercially reasonable.

Section 2-707. “Person in the Position of a Seller”.

(1) A "person in the position of a seller" includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

(2) A person in the position of a seller may as provided in this Article withhold or stop delivery (Section 2-705) and resell (Section 2-706) and recover incidental damages (Section 2-710).


340 See Queen v. Kenova Hardwood Flooring Co. and Bennett & Hester v. Dayton, note 339 supra, which deal incidentally with the seller's right to deduct reasonable costs involved in the resale from the amount recovered on such sale.

West Virginia case law does not reveal any particular policy of limiting the rights of third parties to sue upon or exercise other remedies of the seller and his contract. Most of the usual situations anticipated would fall within, so far as suit is concerned, the "direct legal interest" necessary for a law action on the contract.\textsuperscript{342}

Section 2-708. Seller’s Damages for Non-acceptance or Repudiation.

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710) but less expenses saved in consequence of the buyer’s breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

Subsection (1) states the standard contract measure of damages, recognized in West Virginia,\textsuperscript{343} but makes this rule subject to subsection (2), the profit rule, where the latter would put the seller closer to the position he would have enjoyed had there been no breach. West Virginia has never ruled directly on the profit measure of subsection (2) but case authority tends to point to this view as acceptable in a proper case.\textsuperscript{344} The Uniform Sales Act discouraged


\textsuperscript{344}In Horn v. Bowen, 136 W. Va. 465, 67 S.E.2d 737 (1951) the court referred to profit as a proper measure of damages in a case where plaintiff subcontracted a land clearing operation and his profit was easily measured by the difference in the amount he was to receive under his prime contract and the amount he was to have paid under his subcontract.
resort to profit as a measure\textsuperscript{345} and divergent lines of authority developed under that act.\textsuperscript{346} The profit measure is peculiarly appropriate and convenient in the sales of standard priced, mass produced items sold by dealers or merchants, such as automobiles, appliances and the like. The parenthetical inclusion of overhead costs is appropriate for those situations where the cost to a manufacturer makes up one half of the damage formula. In this, the Code follows the view of a leading Pennsylvania case.\textsuperscript{347}

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Section 2-709. Action for the Price.

(1) When the buyer fails to pay the price at it becomes due the seller may recover, together with any incidental damages under the next section, the price

(a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (Section 2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

\textsuperscript{345} Under Uniform Sales Act § 64 (3) the contract price less the market price formula applied unless there was no "available market" or "special circumstances" showed damages of a greater amount.

\textsuperscript{346} See, Annot., 24 A.L.R.2d 1011 (1952); McCormick, Damages, § 173 (1935); Am. Jur., Sales § 616.

\textsuperscript{347} Jessup & Moore Paper Co. v. Bryant Paper Co., 297 Pa. 483, 147 Atl. 519 (1929).
Present West Virginia authority permits an action for price only where title to the goods have passed to the buyer.\textsuperscript{346} This provision would expand the opportunities for the seller to bring an action for the price under subsection (1) (b). Thus the combination of the seller's authority to identify goods to the contract after repudiation by the buyer\textsuperscript{349} and a subsequent inability to resell at a reasonable price would afford the aggrieved seller the opportunity for an action for the price which does not presently exist.

\section*{Section 2-710. Seller's Incidental Damages.}

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

This provision generally restates existing West Virginia law.\textsuperscript{350}

\section*{Section 2-711. Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods.}

\begin{itemize}
  \item[(1)] Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid
    \begin{itemize}
      \item[(a)] "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
      \item[(b)] recover damages for non-delivery as provided in this Article (Section 2-713).
    \end{itemize}
  \item[(2)] Where the seller fails to deliver or repudiates the buyer may also
\end{itemize}

\textsuperscript{346} Acme Food Co. v. Older, 64 W. Va. 255, 61 S.E. 235 (1908).
\textsuperscript{349} U.C.C. § 2-704.
\textsuperscript{350} Bennett & Hester v. Dayton, 102 W. Va. 197, 135 S.E. 13 (1926); Allen v. Simmons, 90 W. Va. 774, 111 S.E. 838 (1922).
(a) if the goods have been identified recover them as provided in this Article (Section 2-502); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this Article (Section 2-716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2-706).

This section generally lists the remedies available to a buyer in much the same way that section 2-703 serves as an index to seller's remedies. Save for the encouragement given to the buyer's right to obtain specific goods which remain in the possession of a defaulting seller, the Code provisions would effect no noticable change in West Virginia law.

The buyer's security interest in rightfully rejected goods is dealt with only in subsection (3) of the present provision, while other remedies listed here are dealt with in more detail in the following Code provisions. The buyer's right to a lien on rightfully rejected goods is clearly inferrable under existing West Virginia law from the case of Norman Lumber Co. v. Keystone Mfg. Co. In that case the defendant buyer rightfully rejected a separable part of a lumber shipment and sold it for the seller's account after the seller claimed the lumber conformed to the contract. The court held that the buyer acted properly in so doing. It should be noted that the comments to this section point out that the buyer's lien upon such goods extends affords security only for those items listed in the subsection, viz., advance payments on the price and expenses incurred.

351 100 W. Va. 515, 131 S.E. 12 (1925). Compare: "There seems to be considerable uncertainty as to the buyer's right to retain possession until the seller has repaid such payments as have been made by the buyer upon the purchase price. . . ." 46 Am. Jur., Sales § 670. The West Virginia case cited involved a sale of lumber shipped from Kentucky to Philadelphia. The court said the buyer may sell for the seller's account ex necessitate rel., viz., by reason of the necessity of the case. Query whether the same principle would be applied if the seller demanded return of the goods at the point of delivery while retaining a part of the purchase price. Under the Code provision the buyer could retain possession to secure his cost of inspection.
in inspection, resale and the like.\textsuperscript{352} The lien would not give a buyer security for his general claim for damages for the seller's non-performance.\textsuperscript{353}

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Section 2-712. "Cover"; Buyer's Procurement of Substitute Goods.

(1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

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This section would do little more than provide a handy label, "cover," for a remedy presently existing in West Virginia law. Several cases have made it clear that a buyer may obtain substitute goods upon learning of the seller's default and that the buyer's measure of damage in such case is the difference between the contract price and the price of the replacement goods.\textsuperscript{354} One of these cases, \textit{G. Elias & Brother v. Boone Timber Co.}\textsuperscript{355} specifically noted the allowance of incidental damages in addition to the contract price, replacement cost differential. Subsection (3) is included in the present section to make it clear that while the buyer may seek "cover" he is not obligated to do so, but may choose instead to seek damages under the following section based on the difference between the contract price and the market price. This view is implicitly recognized in the West Virginia cases.

\textsuperscript{352} Apparently this was the only extent to which the buyer's interest in the rejected goods was recognized in the Norman Lumber Case, note 351, supra.

\textsuperscript{353} U.C.C. § 2-711, Comment 2.


\textsuperscript{355} 85 W. Va. 508, 102 S.E. 488.
Section 2-713. Buyer's Damages for Non-Delivery or Repudiation.

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses save in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

This section states the standard contract rule of damages recognized in numerous West Virginia cases.366

Section 2-714. Buyer's Damages for Breach in Regard to Accepted Goods.

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

366 See, 16 Michie, Juris., Sales § 87. See also the authorities cited in note 355, supra, for cases which hold that the difference between the contract price and replacement cost is the proper measure of damages where the buyer has in fact purchased replacement goods. These cases proceed on the theory that the replacement cost is the best evidence of the market price, where the buyer was reasonably diligent in obtaining such goods, and thus grow out of the general rule of the present section.
In general, this section restates present West Virginia law. The buyer's right to damages for the seller's tender of goods which do not conform to the seller's undertaking is normally treated as a set-off against the purchase price for breach of warranty. Subsection (1) makes it clear that damages suffered by a buyer because of non-conformity not properly considered a breach of warranty may be treated similarly.

The incidental and consequential damages noted under subsection (3) and considered in more detail in the following section have been held proper recoveries under West Virginia decisions.

Section 2-715. Buyer's Incidental and Consequential Damages.

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

This section generally restates existing West Virginia law. Incidental damages referred to in subsection (1) were recognized as


358 See U.C.C. § 2-714, Comment 2, which says subsection (1) is intended to apply to "any failure of the seller to perform according to his obligations under the contract. . . ."

appropriate recoveries in *Norman Lumber Co. v. Keystone Mfg. Co.* which involved expenses incurred by the buyer in reselling rightfully rejected goods. The kinds of expenses specifically listed in subsection (1) set a general pattern and do not exhaust the list of items for which a buyer may recover. The "other reasonable expenses" phrase near the conclusion of this subsection indicates clearly that expenses similar to those expressly listed may also be recovered by the buyer.

Subsection (2) covers two similar kinds of damages which may flow from a buyer's failure to perform or his inadequate performance. Subsection (2) (a) anticipates generally the foreseeable loss resulting from seller's breach, such as buyer's loss of profits on an anticipated resale. *Franklin v. Pence* accords with this view. Subsection (2) (b) covers the "injury to person or property" situation which on occasion may involve damages in substantial amounts. This provision too is in accord with existing law in West Virginia. The limiting factor here arises from the words "proximately resulting" and it is incumbent upon the plaintiff buyer to show the relationship between breach of warranty and the injury or loss complained of. A seller may limit his potential liabilities in certain instances by contract. This subject is dealt with in section 2-719.

Section 2-716. Buyer's Right to Specific Performance or Replevin.

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

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361 U.C.C. § 2-715, Comment 1.
363 Burgess v. Sanitary Meat Market, 121 W. Va. 605, 5 S.E.2d 785 (1939) (damages for illness and medical expenses indicated as proper in suit based on breach of implied warranty of fitness of food); Hayssen Mfg. Co. v. Mootz, 116 W. Va. 204, 179 S.E. 301 (1935) (loss of bread resulting from inferior wrapping machine); Morgan Lumber & Mfg. Co. v. McDaniels & Landis, 101 W. Va. 87, 131 S.E. 879 (1926) (losses on contract suffered by builder resulting from supplier's furnishing of inferior materials); Schaffner v. National Supply Co., 80 W. Va. 111, 92 S.E. 580 (1917); (loss of oil well because of inferior casing supplied by seller).
364 In Morgan Lumber & Mfg. Co. v. McDaniels & Landis, note 363, supra, the court noted that the losses occurring from use of inferior materials after buyer knew or should have known of such conditions could not be charged against the seller. In Schaffner v. National Supply Co., note 363, supra, the buyer was excused for continued use inferior well casing after he became suspect of its quality because seller insisted the casing was as warranted and difficulties in its use resulted from buyer's improper use.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

The aim of this Code section is to "further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale."\textsuperscript{365} The "attitude" of the proposed section does not seem peculiarly at variance with the attitudes expressed by the rather rare West Virginia cases touching upon this subject matter.

\textit{Elk Refining Co. v. Falling Rock Cannel Coal Co.},\textsuperscript{366} a case involving the sale of natural gas, seems to be in full accord with the provision. The buyer of the gas in that case, an industrial user, was allowed specific relief because alternative sources of natural gas were available only at substantial disadvantages. And in \textit{Morgan v. Bartlett},\textsuperscript{367} a case involving a sale of corporate stock,\textsuperscript{368} the court indicated that the "inability to duplicate [the] property in the market" would afford a basis for granting specific performance.

The comments to the present section note that "output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation. . . .\textsuperscript{369} These precise situations seem to be anticipated by the current West Virginia decisions.

\textbf{Section 2-717. Deduction of Damages From The Price.}

The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any

\begin{flushright}
\textsuperscript{365}U.C.C. § 2-716, Comment 1.
\textsuperscript{366}92 W. Va. 479, 115 S.E. 431 (1922).
\textsuperscript{367}75 W. Va. 293, 83 S.E. 1001 (1914).
\textsuperscript{368}The sales article of the Code does not apply to the sale of corporate stock. Section 2-105 (1) specifically excludes investment securities from the definition of "goods." Corporate securities are dealt with separately under article 8.
\textsuperscript{369}U.C.C. § 2-716, Comment 2.
\end{flushright}
breach of the contract from any part of the price still due under the same contract.

There is no West Virginia authority directly in point. Section 2-609 requires prompt notification of breach and this section requires notice of the intention to withhold payment of the price, which would be an additional notice. The apparent significance of the present section is that a buyer’s good faith notice of intention to withhold part or all of the purchase price for a claimed breach would not amount to a breach on the buyer’s part which would justify seller’s cancellation of future performances remaining due. The good faith requirement arises from the general part of the Code, article 1, specifically section 1-203.

Section 2-718. Liquidation or Limitation of Damages; Deposits.

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer’s breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller’s damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.

(3) The buyer’s right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this Article other than subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.
(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this Article on resale by an aggrieved seller (Section 2-706).

Subsection (1) states generally the accepted rule as to the enforceability of stipulated damage provisions in contracts generally. In this, the section fairly reflects the existing law of West Virginia.370

Subsections (2), (3) and (4) proceed in more detail to deal with problems not presently resolved under West Virginia law. There has been some doubt as to the defaulting buyer's right to recover advances made to a seller in excess of any damage suffered by the seller.371 The Code adopts the view in subsection (2) that the buyer may recover back such excess amounts and works out in some detail in that subsection and those remaining the rules by which the amount of this recovery shall be determined.

Section 2-719. Contractual Modification or Limitation of Remedy.

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

The present section gives some general guidance in this very difficult area but leaves much to the discretion of the courts. Existing West Virginia authority on this point is meager and inconclusive.

Hill & Gain v. Montgomery Ward Co.,\(^3\)\(^7\)\(^2\) is the only case found decided by the West Virginia Supreme Court of Appeals touching upon the limitation of remedy in connection with the sale of personal property.\(^3\)\(^7\)\(^2\) There a refrigerator was sold to the buyer with a "guarantee" of satisfaction or the buyer could have back his money. The court viewed this as a valid limitation of remedy when the buyer sued to recover the value of the refrigerator and for damages resulting from a fire originating in that apparatus. Subsection (1) (a) seems to agree that this is a valid limitation of remedy.

Subsection (3) uses the term "unconscionable" to describe limitations of remedy which shall not be enforced. This leaves the door open for the courts to determine the appropriateness of the limitation in the light of all the circumstances of the case. The cross referencing in the official edition of the Code points to the general section on unconscionable provisions, section 2-302, which makes it clear that determinations of unconscionability are for the judge and not the jury, and no doubt that policy would apply in this instance also.

\(^3\)\(^7\)\(^2\) 121 W. Va. 554, 4 S.E.2d 793 (1939).
\(^3\)\(^7\)\(^2\) Compare, Dunham v. Western Union Tel. Co., 85 W. Va. 425, 102 S.E. 113 (1920) (limitation of liability upon sending telegram held reasonable and valid); Fielder & Turley v. Adams Express Co., 69 W. Va. 138, 71 S.E. 99 (1911) (carriers liability limited to agreed valuation held valid). See also, Maryland Cas. Co. v. Owens-Illinois Glass Co., 116 F. Supp. 122 (S.D. W. Va. 1953) (Suit by subrogee of Virginia buyer against Ohio manufacturer-seller, holding disclaimer of warranty valid, apparently applying Ohio law, and disclaimer of negligence liability valid also as applied in the instant case).
It should be noted that this provision deals only with the limitation of the remedy once the warranty has been established, where the theory of recovery is a breach of warranty. It is possible, in addition, for the seller to effectively disclaim all warranties completely.\textsuperscript{\textsuperscript{374}}

Section 2-720. Effect of "Cancellation" or "Rescission" on Claims for Antecedent Breach.

Unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

The section is perhaps a bit hypercautious, but in view of occasional strained opinions its presence is at least justifiable.\textsuperscript{\textsuperscript{375}} In general accord is \textit{Wiggin v. Marsh Lumber Co.},\textsuperscript{\textsuperscript{376}} where a question of waiver was directly concerned. There it was held that a buyer's reluctant extension of time for performance did not waive its right to recover reasonable liquidated damages under the terms of the original contract.

Section 2-721. Remedies for Fraud.

Remedies for material misrepresentation or fraud includes all remedies available under this Article for non-fraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

There is no direct West Virginia authority dealing with the proposition advanced by this provision. There is a mass of case law generally on the question of "election of remedies" generally\textsuperscript{\textsuperscript{377}} but none of this has been focused on sales situations in West Virginia.

\textsuperscript{374} See U.C.C. § 2-316.
\textsuperscript{375} See the toying with the "recission" phrase in American Sugar Refining Co. v. Martin-Neely Grocery Co., 90 W. Va. 730, 111 S.E. 759 (1922).
\textsuperscript{376} 77 W. Va. 7, 87 S.E. 194 (1915).
\textsuperscript{377} See generally, note, 120 A.L.R. 1154 (1939).
The point of the Code provision is clear and seems quite fair. The kind of damages anticipated by this section would include consequential damages, such as those suffered by a merchant resulting from his sale of inferior merchandise to regular customers, as allowed in American Pure Foods Co. v. Elliott, a North Carolina case, and such incidental damages as costs incurred in testing and returning goods, as allowed in the Alabama case of Caffey v. Alabama Mach. & Supply Co.

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Section 2-722. Who Can Sue Third Parties for Injury to Goods.

Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract

(a) a right of action against the third party is in either party to the contract for sale who has title to or a security interest or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;

(b) if at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, his suit or settlement is, subject to his own interest, as a fiduciary for the other party to the contract;

(e) either party may with the consent of the other sue for the benefit of whom it may concern.

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No West Virginia authority on this particular question is found. The provision is a form of a real party in interest statute applicable to goods in the process of sale and can serve to avoid problems which might otherwise arise from the Code's abandonment of the title concept.

379 19 Ala. App. 189, 96 So. 454 (1922).
Section 2-723. Proof of Market Price: Time and Place.

(1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (Section 2-708 or Section 2-713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

(2) If evidence of a price prevailing at the time or places described in this Article is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

(3) Evidence of a relevant price prevailing at a time or place other than the one described in this Article offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise.

Reiser v. Lawrence is in accord with the general purpose of this section. In the Reiser case, the West Virginia court held that it was proper to prove market price at the place of delivery by reference to the price in another market upon a showing that the price at the point of delivery was regularly determined by reference to the other market. (Pittsburgh oil price based on Oklahoma prices.) The Code section is aimed at giving the court substantial leeway in admitting evidence to establish a market price.

Section 2-724. Admissibility of Market Quotations.

Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

381 96 W. Va. 82, 123 S.E. 451 (1924).
No West Virginia authority is found on the point. One Virginia decision in 1899 however held inadmissible testimony of a witness as to market prices based upon his reading of market reports published in a newspaper of general circulation.382 The Code provision does not reach this question,383 but only deals with the admissibility of the report itself.384

Section 2-725. Statute of Limitations in Contracts for Sale.

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

The Code provision would shorten the time in which an action on contract could be commenced. Presently, actions on written contracts may be started ten years after the cause arose, and actions

382 Norfolk & W. Ry. v. Reeves, 97 Va. 284, 33 S.E. 606 (1899).
383 See a note on the distinction between testimony as to market price based on market reports and the admission of the reports themselves in 45 Mich. L. Rev. 748 (1947).
384 Cf., 6 Wigmore, Evidence § 1704 (3d ed. 1940).
on oral contracts would be timely if commenced within five years.\footnote{385 W. Va. Code, ch. 55, art. 2, § 6 (Michie 1961).} The Code limitation on sales actions makes no distinction between oral and written contracts of sale. One of the moving considerations underlying the adoption of the relatively short period was to reduce the record keeping requirements of business concerns.\footnote{386 U.C.C. § 2-725, Comment 1.}

Insurance law provides the only parallel found in existing West Virginia law for the concluding portion of subsection (1) dealing with the authority of the parties to alter the statute of limitations by contract. An early case held enforceable a clause in an insurance contract which required the action to be commenced within six months.\footnote{387 McFarland & Steel v. Aetna Fire & Marine Ins. Co., 6 W. Va. 437 (1873).} The Insurance Code now prohibits contract reductions of the period below a minimum of two years for most kinds of insurance contracts,\footnote{388 W. Va. Code, ch. 33, art. 6 § 14 (Michie 1961).} but no clear authority is found on this question in other types of contracts.

Subsections (3) and (4) pose a bit of a problem when compared to present West Virginia Law. Subsection (3) permits a new action to be commenced with six months where the termination of the original suit would “leave available a remedy by another action on the same breach. . . .” A similar provision in the present West Virginia Code, not limited to sales contract actions, of course, permits a new action to be brought within one year where the original action was dismissed “by reason of a cause which could not be plead [sic] in bar of an action or suit . . .”\footnote{389 W. Va. Code, ch. 55, art. 8, § 18 (Michie 1961).} The provisions are essentially overlapping. The Code provision would require the new action within a shorter period where the cause arose out of a sale of goods transaction. Subsection (4) could plausibly be argued as effectively overruling the six months limitation of subsection (3). The argument could proceed on this line: Subsection (4) of the Code provision saves all “tolling” statutes and the present statute in West Virginia permitting a new action within one year after a “non-merit” termination of the prior suit may properly be considered a “tolling” statute. The better interpretation here would be that the saving provision of the present West Virginia statutes is not a “tolling” statute in the sense of subsection (4) of the Commercial Code provision and that the six-month saving provision of the Code, subsec-
tion (3), should be applicable to sales of goods transactions. This admission creates a unique rule for sales transactions, but the sales article as a whole changes a number of general rules as they apply to sales transactions, parole evidence, identity of offer and acceptance, etc. The alternative would be to delete subsection (3) from the present section and rely on the existing statute provision in West Virginia. This would have the disadvantage of making the Code non-uniform in West Virginia.